

Synopsis of Various Offshore Jurisdictions



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Asset protection planning takes many forms. There are several countries and various American states that hold themselves out as suitable 'asset protection jurisdictions.' As for the American states that have enacted asset protection statutes, most notably Nevada, Delaware, Alaska and South Dakota, these are not the focus of this article and are worth mentioning only so much as to illustrate that any practitioner offering asset protection services would be well advised to be aware of the weaknesses of Domestic Asset Protection planning. Accordingly I will only briefly discuss Domestic Asset Protection Trusts ('DAPTs') versus Offshore Asset Protection Trusts.

Quite simply put, by most measurable standards, Foreign Asset Protection Trusts ('FAPTs') are the most reliable asset protection vehicles available. Considering that the essence of an APT is essentially to put an asset beyond the reach of a creditor, it seems obvious that if the asset remains domiciled in the US, anywhere in the US, it is potentially vulnerable to a creditor utilizing American courts. Keeping in mind that transfers to a trust are, by their very nature, generally without consideration, a creditor bringing a timely claim against a DAPT can set aside the transfer under the various state adaptations of the Uniform Fraudulent Transfer Act, the Federal Bankruptcy Act or any number of other Federal and state laws that disfavor transfers for little or no

consideration. Cases have demonstrated that the Full Faith and Credit Clause and the Supremacy Clause of the US Constitution make a DAPT vulnerable. (See e.g. Waldron v. Huber, 2013 WL 2154218 (Bk.W.D.Wa., Slip Copy, May 17, 2013), Case No. 3:14-cv-05083; Kilker v. Stillman, 2012 WL 5902348 (Cal.App. 4 Dist., Unpublished, Nov. 26, 2012)).

In contrast, in the case of Offshore or Foreign Asset Protection trusts, a judge simply cannot compel a foreign trustee to release assets to your client's judgment creditors. Most of the jurisdictions with asset protection legislation will not even recognize a judgment that originates in another country thus forcing the creditor to essentially re-litigate the claims in the offshore jurisdiction. Moreover, most jurisdictions with asset protection statutes have very short limitation periods for bringing a claim against the trust such that often, before the creditor even obtains a domestic judgment, the statute of limitations in the offshore jurisdiction has already run. Even if the creditor gets its claim filed in a timely manner, re-litigating the claim requires physically appearing in the offshore jurisdiction and overcoming procedural obstacles, making the task of challenging the trust truly daunting. Additionally, unlike the US, most offshore jurisdictions have no bankruptcy laws and therefore there are no claw-back provisions. In these situations the creditor is left with no option other than common law fraud as a theory to convince a court to void a dispo-

sition to a trust.

While the effectiveness of the FAPT is clearly superior if domiciled offshore, not all offshore jurisdictions are the same. The purpose of this article is to compare and contrast some of the jurisdictions with asset protection legislation to assist the practitioner in making a decision as to where to domicile an APT. Of course, the starting point in selecting an appropriate jurisdiction in which to domicile an APT is that jurisdiction's statutes which vary from jurisdiction to jurisdiction. Beyond the legislation there are other issues to consider in selecting an appropriate jurisdiction in which to establish an APT. These issues include, but are not limited to, the jurisdiction's political situation. (Is it stable? Is it possible that the client's assets will be seized or compromised?) Does the country have a familiar legal system (i.e., a common law system vs. a civil law system)? Other factors often overlooked are the jurisdiction's location and the quality of its judiciary.

In this article I compare and contrast some of the jurisdictions commonly used to establish APTs. The jurisdictions I will cover are the Cook Islands, the Cayman Islands, Nevis, Belize and the Bahamas. While this is by no means a comprehensive list of offshore jurisdictions with legislation providing for APTs, these are some of the more common jurisdictions used by American practitioners. Together, they illustrate some of the features of the various statutes that appeal to American clients.

COOK ISLANDS

The Cook Islands is the ‘granddaddy’ of asset protection jurisdictions having one of the older, and better-tested asset protection statutes. APTs are governed by the International Trust Act of 1984. The statute has only been slightly amended from its original form and remains, in the opinion of this author, one of the most robust, useable statutes in this area.

The Cook Islands is an independent, English-speaking sovereign nation. The nation consists of 15 islands with a total land area of only 240 square kilometers (92.7 sq. mi). While its land mass is small, the Cook Islands’ Exclusive Economic Zone covers 1,800,000 square kilometers (690,000 sq. mi) of ocean. It is located in the South Pacific approximately 2,940 miles south of Honolulu, HI; 4,700 miles southwest of Los Angeles, CA; and 1,900 miles northeast of Auckland, New Zealand. The Cook Islands are in the same Time Zone as Hawaii, and two hours behind Pacific Standard Time. While the remote location of the Cook Islands may ‘put off’ some clients, the location serves to ‘put off’ creditors as well.

The Cook Islands is a member of the British Commonwealth, and has a freely elected, parliamentary form of government. The government is stable and will be familiar to westerners. It has a unique ‘free association’ relationship with New Zealand wherein Cook Islanders carry New Zealand Passports, use New Zealand Currency and may freely work in, and travel to and from New Zealand. The Cook Islands’ main population center is on the island of Rarotonga which is also the nation’s capital. On Rarotonga, you will find modern infrastructure including broad band internet, excellent cell phone coverage and an international airport. It is also where all of the financial services companies can be found.

THE LAW

As the Cook Islands is small, in order to prevent bias and favoritism, its Constitution prohibits citizens from serving on the Bench. Cook Islands Constitution §49(2). In order to serve as a Judge in the Cook Islands a person must have either served as a justice of the High Court of New Zealand, on the Court of Appeal of New Zealand, or on the Supreme Court of New Zealand. *Id.* §49(3). A person that has practiced as a barrister in New Zealand or in a country with an equivalent legal system for at least seven years may also serve. *Id.* The result of these constitutional provisions is that the judiciary is by and large unbiased, excellent and of a caliber that might otherwise be difficult to find in such a small country.

The legal system in the Cook Islands is founded upon English Common Law. The statute governing trusts is the International Trust Act of 1984, as amended. Trusts registered under the International Trust Act are exempt from any taxation in the Cook Islands. International Trust Act §27B(a)(ii). The legislation explicitly provides for the establishment of self-settled, spend-thrift trusts. *Id.* §13F. The settlor may retain significant powers. *Id.* §13C. It provides for a choice of governing law provision and provides that community property transferred to an international trust retains its character as community property. *Id.* §§13G, 13J.

The courts of the Cook Islands will not recognize a judgment from a foreign jurisdiction *Id.* §13G. Accordingly a creditor must first

come to the Cook Islands, establish its claim and then prove beyond a reasonable doubt that the trust and subsequent transfer of assets was to defeat that particular creditor. *Id.* §13B. If a solvent settlor settles a trust prior to an occurrence giving rise to a cause of action, the protection offered by the trust is essentially immediate, and any cause of action against the trust is effectively barred. *Id.* §13B. Moreover, the statute’s definition of “solvent” is narrow. A settlor is “solvent” under Cook Islands law so long as settling the trust leaves the settlor with enough property to satisfy the particular creditor’s claim (if successful). *Id.* §13B(2). In other words, to be solvent one must merely possess the ability to pay the debt ultimately in question without consideration of any other obligations that the settlor might have.

If a trust is settled more than two years after the date of the occurrence of the event giving rise to the claim, then transfers to the trust are statutorily deemed not fraudulent. Id. §13B(3)(a). If the trust is settled less than two years after the date of the event giving rise to the claim, then the creditor must commence a cause of action within one year from the date of

settlement of the trust. Id. §13B(3)(b).

The International Trust Act has explicitly eliminated any prohibitions against perpetual trusts. Id. §6. The Cook Islands does not have bankruptcy legislation thus denying a creditor relief under a claw-back provision. The International Trust Act of 1984 provides that the settlor's bankruptcy does

not render the trust void or voidable. Id. § 13A

OTHER LEGISLATION OF NOTE

The Cook Islands also has legislation providing for International Business Corporations, Limited Liability Corporations, and Foundations. □

CAYMAN ISLANDS

The Cayman Islands are a British Crown Colony located in the Caribbean. The country consists primarily of three islands: Grand Cayman, Cayman Brac and Little Cayman. It is located 500 miles south of Miami, Florida; south of Cuba and northwest of Jamaica. It is in the same time zone as the eastern US. The Cayman Islands issues its own currency, the Cayman Island dollar. English is the official language of the Cayman Islands. Its government is a parliamentary democracy. However, the United Kingdom has reserved the right to disallow bills passed by the legislature and approved by the governor. Cayman Islands law is also derived from English common law and supplemented by local legislation. While the proximity of the Cayman Islands to the US and its familiarity to most Americans might increase the comfort level of a client, it will inevitably do so for creditors as well. The Cayman Islands court of appeal is the highest court in the nation. The court of appeal and grand court judges are appointed by the governor on the advice of a judicial and legal services commission. The Cayman Islands court system is reasonably well developed, with final appeals ultimately heard by the Privy Council in London.

THE LAW

Cayman Islands Trust law is principally codified in three statutory instruments: Trusts Law (2009 Revision) (the 'Trusts Law'), the Fraudulent Dispositions Law (1996 Revision) and the Perpetuities Law (1999 Revision).

Under Cayman law, trust property may be exempted from income tax, capital gain tax, wealth tax, withholding tax, gift tax, or inheritance tax for up to 50 years if the trustee obtains a certificate from the Governor-in-Council confirming that the trust will remain exempt from any potential future taxes for the specified time. Trusts Law 2009 Revision §81(1)-(2).

The Fraudulent Dispositions Law (1996 Revision) provides that any disposition of property to a trust is voidable within six years at the instance of a creditor if that disposition was in fact an attempt to defraud creditors. Id. §4(3). The burden of proof to establish the fraudulent intention is upon the creditor. Id. If a court finds that a voidable transfer has been made it will only set aside what it finds to be voidable to the extent necessary to satisfy the claim of the creditor bringing the action. Id. §6. The duration of a trust in the Cayman Islands cannot exceed 150 years. Perpetuities Law (1999 Revision) §5(1).

Although the Cayman Islands have strict secrecy laws, it has entered into the Mutual Legal Assistance Treaty with the United States. Under this agreement, the Cayman Islands will supply information to the United States in connection with certain drug investigations and white-collar crimes. The Cayman Islands does have bankruptcy laws which could lead to diminished asset protection.

OTHER LEGISLATION OF NOTE

The Cayman Islands also has legislation providing for Low Tax Corporations. □

NEVIS

Nevis, along with St. Kitts, is one of two islands comprising the Federation of St. Christopher (collectively, the "Federation"). This two-island nation is located in the Eastern Caribbean approximately thirteen hundred miles southwest of Miami, Florida. It is in proximity to Antigua, Dominica, and Puerto Rico. It is an English-speaking common-law jurisdiction with modern communications facilities and established professional financial services. The Federation became an independent member of the British Commonwealth in 1983, under a constitution granting Nevis autonomy and the right to its own legislative and executive functions. It is notable that in 1993, the relationship between St. Kitts and Nevis became strained over disagreements concerning offshore legislation. Nevis is a member of the Caribbean Community (CARICOM) and the Caribbean Single Market and Economy (CSME). The official currency in Nevis is the Eastern Caribbean dollar.

THE LAW

Nevis asset protection trust law consists mainly of the Nevis International Exempt Trust Ordinance of 1994 ("Ordinance"), effective April 28, 1994 (amended 2000). The Ordinance was modeled after the Cook Islands International Trusts Act of 1984. The Ordinance permits self-settled spendthrift trusts, *Id.* §6(4), prohibits forced heirship, *Id.* §48, and abolishes the common-law rule against perpetuities, *Id.* §5(3). The Ordinance exempts trust assets from income, corporation, gift, withholding, estate, asset inheritance, succession, and stamp taxes. *Id.* §43. Community property transferred to an International Trust in Nevis will maintain its character as Community property. *Id.* §56(1). An interesting aspect of the Nevis law is that a creditor seeking relief against a Nevis asset protection trust will be required to post a \$25,000 bond with the Nevis court in order to proceed with a lawsuit. *Id.* §55.

Similar to the Cook Islands, to attack an international trust the creditor must prove beyond reasonable doubt that the trust was

settled by or on behalf of the settlor with the principal intent to defraud that particular creditor and at the time such settlement took place and that said settlement rendered the settlor insolvent. *Id.* § 24(3)(a)(b). Even in such a case, a settlement or disposition will not be void or voidable but rather shall be available to satisfy the creditor's claim to the extent of the interest that the settlor had in the property prior to settlement. *Id.*

A disposition of property to a Nevis International Trust shall not be fraudulent as against a creditor of a settlor if the settlement took place before that creditor's claim accrued. *Id.* §44(4). A trust or disposition is deemed not fraudulent as against a creditor if it is settled after the expiration of 2 years from the date that such creditor's cause of action accrued; or where settled before the expiration of 2 years from the date that the creditor's cause of action accrued. *Id.* Moreover, that creditor must commence a cause of action before the expiration of 1 year from the date of such settlement. *Id.* §44(3)(a)(b).

Notwithstanding any provision of the law of the settlor's domicile

or place of ordinary residence, an international trust is not void or voidable in the event of the settlor's bankruptcy, insolvency or liquidation. *Id.* §46.

OTHER LEGISLATION OF NOTE

Nevis also has legislation providing for International Business Corporations, Limited Liability Corporations and Foundations. □



BELIZE

Belize is a country in Central America bordering the Caribbean Sea. Neighboring countries include Guatemala and Mexico. Belize (formerly British Honduras) is the only Central American member of the British Commonwealth. English is its official language, and it utilizes an English common law-based judicial system. The government system is a parliamentary democracy. Belize became an independent republic in 1981 and has been internally politically stable since then; however, it does have an ongoing border dispute with Guatemala. The controversy dates to 1821, when Guatemala gained independence from Spain, and England was occupying what later became Belize. Guatemala claims more than half of what is now territorial Belize. Belize has fewer than 350,000 inhabitants, making it the most sparsely populated country in Central America. It is also Central America's only English-speaking republic. Belize has excellent telecommunications and a convenient time zone as it is in the Central time zone (the same as the midwestern US). Belize has a mixed economic system with both free market and centralized economic planning. Belize issues its own currency, the Belize dollar.

THE LAW

Offshore Trusts in Belize are regulated by the Trusts Act of 1992 (the "Act"). The Act provides that trusts are not subject to Belizean income, estate, or gift taxes when settled by non-residents for the benefit of non-residents. Id. §64.

At Section 6, the Act provides the duration of a trust may not exceed 120 years. It explicitly validates self-settled spendthrift trusts, Id. §12(4), and provides that a settlor may not only choose the governing law of the trust but also permits the terms of the trust to be severed with each severed section subject to different governing

laws. Id. §240.

There seems to be a great misunderstanding regarding statutes of limitations as they apply to claims against a Belizean trust. Belize is often touted as offering immediate asset protection without regards to any statute of limitations on claims. If this were the case I would question whether an American judge would view the statute as legitimate. Be that as it may, while the restrictions upon the Court are generous, the types of claims that can't be pursued are in fact limited. Section 7 of the Act provides that where a Belizean trust is concerned, any claims arising out of marriage, divorce,

forced heirship, or creditor claims in the event of the settlor's insolvency are immediately barred. Id. §7(6). In other words only marital claims, estate claims, and claims from creditors in bankruptcy are barred. All other types of claims for fraudulent transfer may be brought against a Belize international trust.

OTHER LEGISLATION OF NOTE

Belize also has legislation providing for International Business Corporations, Limited Liability Corporations and Foundations. □



THE BAHAMAS

The Bahamas is an archipelago of almost seven hundred islands in the Atlantic Ocean extending from sixty miles east of Palm Beach, Florida, to just north of Haiti. Other proximate countries include Cuba and the Dominican Republic. English is the official language of this common-law member of the British Commonwealth. The Bahamas was settled around 1640 by a group of Englishmen from Bermuda. It has a representative form of government, and has so since the seventeenth century. It has existed as an independent country within the Commonwealth since 1973. While the official currency in the Bahamas is the Bahamas Dollar, US Dollars are freely used there. The Bahamas has an open-market economy and is in the Eastern Time Zone.

THE LAW

Bahamian Asset Protection trusts are by and large governed by the Fraudulent Dispositions Act. Under this Act, a transfer of assets will be voidable if liability to the creditor bringing the claim existed at the date of transfer, and the transfer was for no or inadequate consideration. Fraudulent Dispositions Act §4(1). Before prevailing on a claim the creditor must establish that a transfer was made with intent to defraud. *Id.* §4(2). The Act defines 'Intent to Defraud' as "an intention of a transferor willfully to defeat an obligation owed to a creditor" *Id.* §2. I would note that the defini-

tion does not seem to be limited to a particular creditor. Be that as it may, the burden of establishing an intent to defraud is on the creditor seeking to set aside the disposition. *Id.* §4(2). The transfer is voidable by the creditor who is prejudiced only to the extent of that particular creditor's claim. *Id.* §6. At any rate the creditor must bring his action within two years of the transfer. *Id.* §4(3).

Other Bahamian trust-related legislation includes the Trustee Act 1998, the Trusts (Choice of Governing Law) Act 1989, and the

Trusts (Choice of Governing Law) (Amendment) Act 1996. It is interesting to note that although Bahamian trust law permits a settlor to be a beneficiary of a Bahamian trust, a settlor is not protected by a spendthrift provision in their own trust.

OTHER LEGISLATION OF NOTE

The Bahamas also has legislation providing for International Business Corporations, Limited Liability Corporations and Foundations. □

CONCLUSION

This is just a small sample of the dozens of jurisdictions that have asset protection legislation. The lesson here is that despite the temptation to create a DAPT, there is an appropriate jurisdiction for virtually any client that is interested in or that could benefit from effective asset protection planning. Each offshore jurisdiction has its strengths and weaknesses but there is likely at least one that you and your client will be comfortable with despite the temptation to plan domestically.

About the Author

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Craig is admitted to The Missouri Bar and the Illinois State Bar Association. He is also admitted to practice before the U.S. District Court, Eastern District of Missouri, U.S. District Court, Southern District of Illinois and the U.S. Court of Appeals for the 8th Circuit. 